

The Supremacy Clause Preemption Rationale Reasonably Restrains an Individual State Pursuing Its Own  
Separate but Unequal Immigration Policy

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# THE SUPREMACY CLAUSE PREEMPTION RATIONALE REASONABLY RESTRAINS AN INDIVIDUAL STATE PURSUING ITS OWN SEPARATE BUT UNEQUAL IMMIGRATION POLICY

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## I. INTRODUCTION

This Article addresses how the Supremacy Clause of the United States Constitution<sup>1</sup> and the preemption rationale associated with the clause impact a state's ability to either place burdens on, or grant benefits to immigrants. The issue considered is whether a state has the ability to grant a

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1. U.S. CONST. art. VI, cl. 2.

benefit or place a burden on an immigrant without violating the constitutional command that Congress shall have the exclusive power to regulate immigration. In certain situations, state regulations requiring local law enforcement officers to inquire about a person's federal immigration status have been interpreted as an unconstitutional effort by local officials to regulate immigration.<sup>2</sup> This proposition flows from the understanding that those who are not citizens of the United States may be considered aliens.<sup>3</sup>

The relationship between the federal government and immigration is based on an 1889 California case involving Chinese laborers, where the Supreme Court said that because of the long-established constitutional arrangement that only Congress can exclude aliens from the United States, it should no longer be considered a debatable rule of law.<sup>4</sup> Under our Constitution, the states are given the ability to regulate local affairs through the efforts of local officials; however, regarding immigration issues, states are bound as a single nation united under federal law.<sup>5</sup> State laws regulating immigration, which violate or contradict the U.S. Constitution and other federal laws are absolutely void.<sup>6</sup> Congress is granted the exclusive right to permit immigrants to remain in the country whether they are characterized as undocumented aliens or documented aliens.<sup>7</sup> Congress also possesses an exclusive "right to provide a system of registration and identification" for all immigrants in the country.<sup>8</sup>

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2. See *United States v. Arizona*, 641 F.3d 339, 344, 346 (9th Cir. 2011), *cert. granted*, 565 U.S. \_\_ (2011) (introducing the claim that Arizona's new immigration law "was preempted by the Immigration and Nationality Act ("INA"), and that it violated the Commerce Clause").

3. 8 U.S.C. § 1101(a)(3) (2006); *Chae Chan Ping v. United States* (Chinese Exclusion Case), 130 U.S. 581, 603 (1889); see Freddy Funes, *Beyond the Plenary Power Doctrine: How Critical Race Theory Can Help Move Us Past The Chinese Exclusion Case*, Note, 11 SCHOLAR 341, 341–47 (2009) (describing the history of immigration policies towards the Chinese in California during the 1800s).

4. *Chinese Exclusion Case*, 130 U.S. at 603.

5. *Id.* at 604–06 ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.").

6. See *id.* at 605 (quoting *Cohens v. Virginia*, 19 U.S. 264, 413 (1821)) ("The constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void."). The Court reasoned that as a nation, the United States has a duty to maintain security and independence, and "nearly all other considerations are to be subordinated." *Id.* at 606. To this end, foreign aggression and encroachment, whether through acts of open warfare or "from vast hordes of its people crowding in upon [the United States,]" calls for unified action, rather than piecemeal efforts from individual states. *Id.*

7. *Fong Yue Ting v. United States*, 149 U.S. 698, 714 (1893).

8. *Id.* The Court concluded that although immigration duties may be carried out by all three branches, ultimately, "[t]he power to exclude aliens, and the power to expel them,

The enactment of laws regarding the entrance of immigrants from foreign nations to an American land of opportunity is possessed by Congress alone and not by an individual state or a group of states. In America, only Congress, as the representative of our national government, has the power to regulate immigrants from foreign nations.<sup>9</sup> If this was not so, an individual state, acting on its own, without any consideration of congressional intent could entangle the United States in unfortunate and often unavoidable disagreements with other nations, by means of a single state law.<sup>10</sup> Because there are many excellent grounds demonstrating the need for the United States of America to speak as one voice on the issue of immigration, state laws regulating immigration without the consent of Congress should be considered a violation of the U.S. Constitution's Supremacy Clause.<sup>11</sup> In a 1941 decision challenging the validity of the Alien Registration Act approved by the Commonwealth of Pennsylvania, Justice Black said the supremacy of the national power regulating immigration was recognized by the authors of the Federalist Papers in 1787.<sup>12</sup>

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rest upon [Congress] . . . ." *Id.* at 713. Furthermore, a California law burdening the rights of Chinese people as immigrants in America was properly held to be unconstitutional and void because it was preempted by the congressional power to regulate commerce with other countries. *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1876).

9. *Id.*

10. *Id.*

11. *Hines v. Davidowitz*, 312 U.S. 52, 62–63 (1941).

12. *Id.* at 59, 64. "The importance of national power in all matters relating to foreign affairs and the inherent danger of state action" involving the subject of immigration are described and made clear "in the *Federalist Papers* No. 3, 4, 5, 42 and 80." *Id.* at 63 n.9. Hamilton writes that "the peace of the *whole* ought not to be left at the disposal of a *part*. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it." THE FEDERALIST NO. 80 (Alexander Hamilton). In the *Federalist Paper* No. 42, Madison writes:

If we are to be one nation in any respect, it clearly ought to be in respect to other nations.

. . . .

The dissimilarity in the rules of naturalization has long been remarked as a fault in our system, and as laying a foundation for intricate and delicate questions. By the laws of several States, certain descriptions of aliens, who had rendered themselves obnoxious, were laid under interdicts inconsistent not only with the rights of citizenship but with the privilege of residence. What would have been the consequence, if such persons, by residence or otherwise, had acquired the character of citizens under the law of another State, and then asserted their rights as such, both to residence and citizenship, within the State proscribing them? Whatever the legal consequences might have been, other consequences would probably have resulted, of too serious a nature not to be provided against.

THE FEDERALIST NO. 42 (James Madison). Likewise in the *Federalist Papers* Nos. 3, 4, and 5, John Jay warns against the inherent difficulties of implementation of multiple foreign

In 2010, Arizona adopted Senate Bill 1070 (S.B. 1070).<sup>13</sup> Senate Bill 1070's creation of new immigration-related crimes under state law was immediately explosive and very controversial, provoking intense debates on America's modern immigration law and policy.<sup>14</sup> Some commentators contend that the Constitution and federal law do not authorize an assortment of state and local immigration guidelines throughout the nation.<sup>15</sup> Furthermore, they argue that because Arizona intends to use S.B. 1070 to construct its own immigration policy and enforce state laws that unnecessarily burden federal immigration law, the state crossed the constitutional preemption line.<sup>16</sup> Arizona's S.B. 1070, as initially passed required police to check a person's immigration status upon any "stop, detention, or arrest . . . where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States."<sup>17</sup> The Arizona law demonstrates that noncompliance with the Supremacy Clause preemption rationale on the federal immigration issue is constitutionally problematic for states attempting to regulate immigration, primarily because these state policies challenge established federal immigration policies without ex-

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policies of the individual states, as well as the negative image such potentially conflicting policies would convey to other nations. *THE FEDERALIST* Nos. 3, 4, 5 (John Jay).

13. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *enrolled as amended* by H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010). Although the House Bill made slight changes to the language of S.B. 1070, the popular press refers to the enacted legislation as S.B. 1070 as do I throughout this Article.

14. Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 *GEO. IMMIGR. L.J.* 47, 48 (2010).

15. *Id.* at 81 (2010). To support their point the authors quote from the United States Department of Justice's brief submitted to the Arizona District Court:

The Constitution and federal law do not permit the development of a patchwork of state and local immigration policies throughout the country. Although a state may adopt regulations that have an indirect or incidental effect on aliens, a state may *not* establish its own immigration policy or enforce state laws in a manner that interferes with federal immigration law.

Plaintiff's Motion for Preliminary Injunction and Memorandum of Law in Support Thereof at 1, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-cv-1413-NVW), 2010 WL 29593635; Chin et al., *supra* note 14, at 81.

16. Chin et al., *supra* note 14, at 81. The Arizona law is said to potentially implicate the basic doctrinal variation on federal preemption, "field preemption," in which "the breadth and depth of federal action indicates an intention to occupy to the field to the exclusion of the states" and another form of implied preemption in which compliance with both the state and federal law would be impossible. *Id.*

17. S.B. 1070, art. 8B, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *amended* by H.B. 2162, sec. 3B, 49th Leg., 2d Reg. Sess. (Ariz. 2010). The House Bill was signed into law by the Governor of Arizona on April 30, 2010, amending Section 11-1051 of the Arizona Revised Statutes. H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

press congressional consent.<sup>18</sup> On the other hand, a very recent Supreme Court decision originating in Arizona demonstrates that while states cannot directly take it upon themselves to regulate or enforce immigration they may play a role in regulating the employment activities of immigrants with the permission of Congress.<sup>19</sup>

Professor Haynes contends that as a result of legal uncertainty, it is not a shocking revelation that the states have advised the U.S. government that if it fails to provide services to undocumented immigrants, then the states will be forced to enact state and local laws regulating the rights of immigrants.<sup>20</sup> Even if America's weak enforcement of national immigration policy creates public frustration<sup>21</sup> that fact does not grant each state a green light to use the politics of fear<sup>22</sup> to implement its own local immigration laws without first demonstrating that a local immigration rule is consistent with a purpose of Congress.<sup>23</sup>

Congressional intent is the decisive issue in all preemption cases including immigration issues.<sup>24</sup> The Naturalization Clause prohibits a state from having a unilateral role in the field of immigration because the Naturalization Clause's grant of exclusive immigration power to Congress is a historical recognition of the inherent need for the nation to speak with

18. *United States v. Arizona*, 641 F.3d 339, 346 n.4 (9th Cir. 2011), *cert. granted*, 565 U.S. \_\_\_\_ (2011).

19. *Chamber of Commerce of the United States v. Whiting*, 563 U.S. \_\_\_, 131 S. Ct. 1968, 1973 (2011).

20. Dina Francesca Haynes, *Crossing the Border: The Future of Immigration Law and Its Impact on Lawyers*, 45 *NEW ENG. L. REV.* 301, 303 (2011).

21. *See Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 864 (N.D. Tex. 2008) (recognizing citizen frustration over the refusal of government to enforce a certain ordinance on immigration, but admitting that frustration does not automatically deem the ordinance constitutional).

22. Bill Ong Hing, *Reason over Hysteria*, 12 *LOY. J. PUB. INT. L.* 275, 297 (2011). According to Professor Hing:

The anti-immigrant lobby has used the politics of fear to generate much of the hysteria over immigration today. They advance the image of hordes of immigrants coming from Asia and Latin America to take our jobs and commit crimes, all the while not wanting to speak English. Through fear and intimidation, comprehensive immigration reform has been stalled.

*Id.*

23. *Cf. Medtronic, Inc. v. Lohr*, 518 U.S. 470, 488–90 (1996) (determining that defendant-company's argument must fail, because to interpret the statute otherwise would "produc[e] a serious intrusion into state sovereignty while simultaneously wiping out the possibility of remedy for the [plaintiff] Lohrs' alleged injuries"). In this case, the Court examined the legislative purpose and the history of the legislation, because the actual wording of the statute was ambiguous. *Id.* at 505.

24. *See Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963) ("The purpose of Congress is the ultimate touchstone . . . and may displace state power or it may even by silence indicate a purpose to let state regulation be imposed on the federal regime.").

one voice on immigration issues. In an anti-immigrant tenant regulation case compelling tenants to comply with proof of citizenship or eligible immigration status before signing leasing agreements, the United States District Court for the Northern District of Texas communicated its awareness of the ordinance's extensive media coverage and popular support, locally and nationally.<sup>25</sup> Even as the court attached importance to the frustration of citizens and local public officials about the failure of federal officials to apply or implement federal immigration laws, the court said that "the 'will of the people' in endorsing the Ordinance does not bestow the imprimatur of constitutionality on the Ordinance."<sup>26</sup> The court further describes the impropriety of lending judicial authority on the basis of political popularity.<sup>27</sup> A court that does so abandons its judicial duty to determine whether the anti-immigration law is permitted under the preemption rationale, which is an intrinsic part of the Naturalization Clause of the Constitution.<sup>28</sup> The situation of a state or local statute's potential trespass into federal law which enjoys political popularity cannot insulate it from a court's finding of unconstitutionality.<sup>29</sup>

A popular justification for local laws regulating immigration is that federal immigration law is too dysfunctional to be effective—Professor Olivas correctly believes that a proliferation of local anti-immigration laws that overlap with federal immigration would be equally dysfunctional.<sup>30</sup> I am a supporter of federal immigration reform, but until progressive federal immigration reform is implemented, having one dysfunctional federal immigration system is a lesser evil than having fifty or more dysfunctional immigration policies driving America.<sup>31</sup> In this global economy, a number of communities throughout America have separate but unequal housing ordinances that target undocumented immigrants;<sup>32</sup>

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25. *Villas at Parkside Partners*, 577 F. Supp. 2d at 861–62, 864.

26. *Id.* at 864.

27. *Id.*

28. *Id.*

29. *Id.*

30. Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 53 (2007).

31. *See id.* (discussing the confusing "checkerboard" jurisdictional system that would result if states were allowed to enact their own separate immigration policies).

32. *See generally* Daniel Eduardo Guzmán, Note, "There Be No Shelter Here": *Anti-Immigrant Housing Ordinances and Comprehensive Reform*, 20 CORNELL J.L. & PUB. POL'Y 399 (2010) (examining both the explicit and the facially neutral municipality ordinances used to target undocumented immigrants). An example of such an ordinance would be one which prohibits congregating at day labor centers or which discourages the use of any language other than English. *Id.* at 401. The Illegal Immigration Relief Act Ordinance, passed in 2006 by the city of Hazelton, Pennsylvania, is perhaps one of the most notorious of these ordinances, prohibiting "employing, harboring, and housing undocumented immigrants, and which made English the 'official language' of the city." *Id.*

this undermines the role of Congress in regulating commerce with foreign nations<sup>33</sup> and in establishing uniform rules for immigration.<sup>34</sup>

Part II of this Article discusses the historical and continuing tension between a state's desire to control the rights of immigrants as a local issue and the Constitution's grant of power to Congress to regulate immigration as a national foreign policy issue. Part III discusses why immigration is inherently linked to foreign policy and why the preemption rationale applies to state and local regulations that substantially interfere with the life of any immigrant present in a community because of the potential impact on America's global interest. Part IV presents an analysis of the preemption issue where state laws or policies relating to immigrants are in conformity with the Supremacy Clause. For instance in *Martinez v. Regents of the University of California*,<sup>35</sup> the California Supreme Court held a California law exempting specific undocumented immigrants from paying nonresident tuition and fees at state colleges and universities does not violate the preemption doctrine because the state law does not regulate immigration.<sup>36</sup> Similarly, in the Supreme Court, the *Chamber of Commerce of the United States v. Whiting*<sup>37</sup> decision is an example of the state of Arizona regulating the employment status of immigrants in conformity with the Supremacy Clause because Arizona's law conforms to the intent of Congress.<sup>38</sup> Part IV also analyzes the rationale of the U.S. Supreme Court in *Whiting*. Part V highlights the *United States v. Ari-*

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Both the district court and the Third Circuit Court of Appeals held the Ordinance to be unconstitutional in violation of the Supremacy Clause. Logan Burruss, *U.S. Circuit Court Rules Against Illegal Immigration Laws*, CNN (Sept. 10, 2010, 9:58 AM), <http://www.cnn.com/2010/US/09/09/pennsylvania.immigration.case/index.html>. Certiorari was granted by the U.S. Supreme Court but then vacated and remanded back to the Third Circuit for determination in accordance with the Court's finding in *Chamber of Commerce of the United States v. Whiting*, 563 U.S. \_\_\_, 131 S. Ct. 1968, 1973 (2011). *City of Hazelton v. Lozano*, 563 U.S. \_\_\_, 131 S. Ct. 2958 (2011).

33. See generally U.S. CONST. art. I, § 8, cl. 3. The U.S. Constitution gives to Congress the power "[t]o regulate Commerce with foreign Nations, and among several States, and with the Indian Tribes." *Id.* This power is not limited to only relations between sovereign nations, for the Court has since interpreted that "[c]ommerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments, as individuals." *United States v. Holliday*, 70 U.S. 407, 417 (1865).

34. See generally U.S. CONST. art. I, § 8, cl. 4 (giving Congress the power "[t]o establish a uniform Rule of Naturalization . . .").

35. 241 P.3d 855 (2010), *cert. denied*, 563 U.S. \_\_\_, 131 S. Ct. 2961 (2011).

36. *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 861–62 (2010), *cert. denied*, 563 U.S. \_\_\_, 131 S. Ct. 2961 (2011).

37. 563 U.S. \_\_\_, 131 S. Ct. 1968 (2011).

38. See *Chamber of Commerce of the United States v. Whiting*, 563 U.S. \_\_\_, 131 S. Ct. 1968, 1986 (2011) (identifying Arizona's requirement to have employers use the E-Verify system as amenable with Congress's authorization in the development of the E-Verify program).



*zona*<sup>39</sup> opinion as an example of a state law violating the law of preemption by regulating immigration independent of the federal approval. The Article concludes by explaining that lack of congressional intent on the issue of regulating immigration does not by default create a state right to regulate immigration because immigration is by its very nature foreign policy.

## II. THE HISTORICAL AND CONTINUING TENSION BETWEEN A STATE'S DESIRE TO CONTROL THE RIGHTS OF IMMIGRANTS AS A LOCAL ISSUE AND THE CONSTITUTION'S GRANT OF POWER TO CONGRESS TO REGULATE IMMIGRATION AS A NATIONAL FOREIGN POLICY ISSUE

At the very beginning of this country's existence, the colonies and states controlled immigration law.<sup>40</sup> According to Professor Juliet P. Stumpf, except for two constitutionally-suspect federal statutes enacted in 1798,<sup>41</sup> state and local regulations were the only type of immigration rules to exist in America's first century as a nation.<sup>42</sup> Regulations implemented by local public officials to oppose immigrants represent an original American national perspective for many.<sup>43</sup> In fact, the original thirteen colonies made an effort to segregate on the basis of nationality by offering preferred immigration status to exclusive groups.<sup>44</sup> Benjamin Franklin was against the admission of Germans into Pennsylvania,<sup>45</sup> while George Washington was an advocate of a very inclusive immigration policy that was reflected in "the first federal immigration law in the United States."<sup>46</sup> The United States enacted its first immigration statute in 1790, which officially transferred the subject of immigration from state

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39. *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011), *cert. granted*, 565 U.S. \_\_ (2011).

40. Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1564 (2008). One of the earliest examples of a classic immigration law within the United States was the order of the General Court of Massachusetts, issued in 1637, forbidding settlement within a town without official permission. *Id.*

41. *Id.* at 1566 (citing the Alien Enemy Act of 1798, ch. 66, 1 Stat. 577 (codified as amended at 50 U.S.C. §§ 21–24 (2000))) (providing for removal of aliens from countries at war with the United States when the president deems such an alien to be a danger to the United States). *See* Alien Act of 1798, ch. 58, 1 Stat. 570 (granting the president the exclusive power to expel even friendly aliens). The Alien Act expired in 1800.

42. Stumpf, *supra* note 40, at 1566 (citing GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 19–20 (1996)).

43. Ong Hing, *supra* note 22, at 277.

44. *Id.* The colonies also enacted laws prohibiting immigration based on race, socioeconomic status and religion. *Id.*

45. *Id.*

46. Kevin J. Fandl, *Immigration Posses: U.S. Immigration Law and Local Enforcement Practices*, 34 J. LEGIS. 16, 17 (2008).

and local control to federal dominion with the adoption of a uniform rule of naturalization.<sup>47</sup>

Nevertheless, many states in the twenty-first century enacted statutes designed to control immigration locally.<sup>48</sup> It is the contention of one scholar that the first ten years of the twenty-first century provided a harsh reality check for all immigrants living in the United States regardless of whether the immigrant was classified as documented or undocumented.<sup>49</sup> As a result of the lack of needed sweeping federal immigration upgrades, many states and municipalities enacted an assortment of local ordinances, statutes, and ballot initiatives to regulate the immigration issues facing their local community.<sup>50</sup> As the economy struggles to emerge from the most recent downturn, the debate as to whether the existence of immigrants in the United States is a benefit or burden on our national economy becomes a starting place for intense debate regarding immigration policy.<sup>51</sup>

Since the United States approved its federal immigration law in 1790,<sup>52</sup> U.S. immigration law has consistently been recognized as being under the jurisdiction of federal law, superseding any state or local legislation that conflicts with established national laws.<sup>53</sup> In the 1849 *Passenger Cases*,<sup>54</sup> the Supreme Court held that the power to regulate immigration belongs exclusively to Congress.<sup>55</sup> Over a century later in the 1976 *De Canas v.*

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47. *Id.*

48. Kristina M. Campbell, *Imagining a More Humane Immigration Policy in the Age of Obama: The Use of Plenary Power to Halt the State Balkanization of Immigration Regulation*, 29 ST. LOUIS U. PUB. L. REV. 415, 415 (2010).

49. *Id.* at 449.

50. *Id.* at 415.

51. *Id.*

52. Fandl, *supra* note 46.

53. *Id.* at 20; *see, e.g., De Canas v. Bica*, 424 U.S. 351, 354-55 (1976) (“Power to regulate immigration is unquestionably exclusively a federal power.”); *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893) (“[E]very sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”) (quoting *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892)); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1876) (holding that keeping immigration law within the control of the federal government aids in preventing clashes between individual states and foreign nations); *Henderson v. Mayor of New York*, 92 U.S. 259, 266, 271 (1876) (questioning “whether the act assumes to regulate commerce between the port of New York and foreign ports, and is unconstitutional” and holding that it was not in conflict because it was within the state’s police powers); *Smith v. City of Boston (Passenger Cases)*, 48 U.S. 283, 283 (1849) (considering a challenge against state statutes taxing alien travelers entering that state’s ports).

54. 48 U.S. 283 (1849).

55. *Passenger Cases*, 48 U.S. at 464.

*Bica*<sup>56</sup> opinion, the Supreme Court took the position that not “every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* preempted by this constitutional power . . . .”<sup>57</sup> Since not every law passed by a state or local government regarding immigrants is preempted by federal law, the historical tensions between the federal government regulatory power regarding immigrants and a state’s right to enact laws impacting immigrants is not easily resolved when Congress has failed to expressly state its intent to preempt because the purpose of Congress is the basis of any preemption analysis.<sup>58</sup>

In 1876, the Supreme Court held in *Chy Lung v. Freeman*<sup>59</sup> that a California statute designed to obtain money under duress from foreign passengers by denying access to the United States by way of California was unconstitutional under the Commerce Clause. The plaintiff, a citizen of the Emperor of China, was a passenger on a boat from China and became a prisoner of the state of California because the owner or operator of the boat that transported her to the shores of California declined to provide a bond (as required under a California statute) in the amount of five hundred dollars in gold “to indemnify all the counties, towns, and cities of California against liability for her support or maintenance for two years.”<sup>60</sup> The Court’s decision described the California law as a very extraordinary law<sup>61</sup> because it gave a single state official the power to prevent boats engaged in foreign trade between China and the United States from transporting immigration passengers unless the Chinese merchants “submit[ted] to systematic extortion of the grossest kind.”<sup>62</sup>

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56. 424 U.S. 351 (1976).

57. *De Canas*, 424 U.S. at 355.

58. See *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (reiterating that preemption analysis begins with the purpose of Congress). A state’s authority may be preempted by Congress when provided statutorily in clear and express terms. *Id.* However, clear and express language is not the only means by which Congress may preempt a state’s authority. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 203 (1983).

Absent explicit pre-emptive language, Congress’ intent to supersede state law altogether may be found from a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room to supplement it, because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or because the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.

*Id.* at 203–04 (internal quotations omitted).

59. 92 U.S. at 275 (1876).

60. *Chy Lung v. Freeman*, 92 U.S. 275, 276 (1876).

61. *Id.* at 277.

62. *Id.* at 278.

The power to extort money from Chinese nationals under the California statute was an unconstitutional exercise of power that could likely create conflict with China under the Commerce Clause, and only Congress possesses the authority to control commerce with foreign nations.<sup>63</sup> In *Chy Lung*, the Supreme Court said that it was not deciding whether the state of California had the right “in the absence of legislation by Congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad.”<sup>64</sup> This suggested that in appropriate circumstances, a state may demonstrate a vital necessity to exercise the right to protect itself from convicted criminals and paupers from foreign nations when Congress has not addressed the issue with federal legislation.<sup>65</sup> The California law in *Chy Lung* exceeded what was necessary, or even appropriate, to protect the state against an influx of poor immigrants or the entrance of immigrants with criminal convictions; the California immigrant-exploitation law’s manifest purpose was not to obtain indemnity for reasonably foreseeable economic losses caused by immigrants, but to make money for the state of California at the potential expense of the federal government’s right to regulate foreign affairs.<sup>66</sup> The preemption rule as a guiding rationale is embedded in the Supremacy Clause,<sup>67</sup> and that rationale, by implication, renders all state or local laws invalid which interfere with, or conflict with, the federal government’s explicit power to regulate foreign affairs.<sup>68</sup>

During the same term of October 1875, the Court heard a case involving citizens from Great Britain. In *Henderson v. Mayor of New York*,<sup>69</sup> owners of a steamship named *Ethiopia* which came to the port of New York from Glasgow, Scotland on June 24, 1875, transporting passengers successfully challenged a New York law requiring ship owners from a foreign port to post bonds for their foreign passengers within twenty-four

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63. See U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . .”); see also *Chy Lung*, 92 U.S. at 280 (holding a California statute unconstitutional because it was a regulation of commerce, a duty belonging only to the U.S. Congress).

64. *Chy Lung*, 92 U.S. at 280.

65. *Id.*

66. *Id.*

67. *Id.*

68. Rose Cuison Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979, 1033–34 (2010). In *Oyama*, Japanese citizen Kajiro Oyama passed a land deed to his American-born son Fred Oyama, but California petitioned for escheat on that land due to California Alien Land Laws. *Oyama v. California*, 332 U.S. 633, 636–37 (1948). The Court held that the law did not deprive Fred Oyama of any constitutional guarantees “since the land had passed to the State without ever vesting in him.” *Id.* at 639–40.

69. 92 U.S. 259, 267 (1876).

hours of their arrival.<sup>70</sup> The ship owners were required to give a bond for every foreign passenger to indemnify the Commissioners of Emigration, and every county, city, and town in the state of New York against any expense for the relief or support of the person named in the bond for the next four years; however, a ship owner could avoid posting the bond by paying for each passenger, within twenty-four hours after his or her landing, "the sum of one dollar and fifty cents."<sup>71</sup> Similar to *Chy Lung*, the law was held to be unconstitutional because it interfered with the right of Congress to regulate commerce with foreign nations and among the states.<sup>72</sup> The New York law demanding bonds or a tax for passengers from a foreign nation was also held to violate the Constitution's Import-Export clause,<sup>73</sup> which prohibits states from imposing import or export taxes without the consent of Congress.<sup>74</sup> The Supreme Court properly rejected New York's contention that the purpose of its bond law was "to protect the State against the consequences of the flood of pauperism immigrating from Europe and first landing in that city" because the bond requirement operated as an unreasonable tax on every passenger who came from abroad regardless of his socio-economic status.<sup>75</sup>

The New York bond requirement law was in effect a tax on immigrants; a person who added to the wealth of the United States of America and was free from any disease was subject to the same tax as an unhealthy, poor person who was at risk of needing help from the city of New York on the same day the ship landed.<sup>76</sup> Congress, under authority of the Con-

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70. *Henderson v. Mayor of New York*, 92 U.S. 259, 265, 269 (1876).

71. *Id.* at 267. Under the New York Act of 1849, the carrier of passengers from a foreign port were required to provide a \$300 indemnity bond with sureties and a continuing liability for four years to the State of New York for each passenger not a United States citizen after arriving in New York, regardless of whether the passenger intended to remain in the State or was simply traveling through New York without delay and on his way to another state or country. *Id.*

72. *Id.* at 270-71.

73. *Id.* at 269.

74. U.S. Const. art. I, § 10, cl. 2. "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . ." *Id.*

75. See *Henderson*, 92 U.S. at 269 (discussing taxing of foreigners immigrating to the United States). The Supreme Court believed it was strange to tax all individuals the same and noted that:

The man who brings with him important additions to the wealth of the country, and the man who is perfectly free from disease, and brings to aid the industry of the country a stout heart and a strong arm, are as much the subject of the tax as the diseased pauper who may become the object of the charity of the city the day after he lands from the vessel.

*Id.*

76. *Id.*

stitution, is given the ability to regulate immigrant passengers coming to America<sup>77</sup> because these rules directly involve international relations under the Commerce Clause.<sup>78</sup> Courts have historically employed the preemption doctrine to invalidate state and local laws that try to regulate immigration because those laws have a tendency to weaken Congress's sole authority to regulate both immigration and commerce with other foreign nations.<sup>79</sup>

A regulation by a state or local official that imposes heavy burdens on those involved in commerce with foreign nations is, by necessity, national in its character and must be regulated by the federal government.<sup>80</sup> Similarly, regulations that impose heavy burdens on immigrants living in the United States seeking to rent a home or seeking employment even if it involves intrastate commerce are also considered national in character and are regulated by the federal government because any local laws enacted on the subject are likely to have an inherent impact on the United States' international relationship with other countries.<sup>81</sup> When a state enacts laws that impact immigration, the assumption of non-preemption does not work in favor of the state because of the history of considerable federal authority in regulating both commerce and immigration.<sup>82</sup> For more than one hundred years, the Supreme Court has consistently maintained that there is no conceivable topic where the legislative power of Congress is more complete than the regulation of immigration.<sup>83</sup>

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77. *Id.* at 270.

78. *Id.* at 272–73.

79. Cuison Villazor, *supra* note 68, at 1034.

80. *Henderson*, 92 U.S. at 273.

81. *See id.* (illustrating that national and international issues lie clearly within the jurisdiction of Congress). Writing for the Court, Justice Miller stated as follows:

A regulation which imposes onerous, perhaps impossible, conditions on those engaged in active commerce with foreign nations, must of necessity be national in its character. It is more than this; for it may properly be called *international*. It belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments. If our government should make the restrictions of these burdens on commerce the subject of a treaty, there could be no doubt that such a treaty would fall within the power conferred on the President and the Senate by the Constitution.

*Id.*

82. *Fonseca v. Fong*, 84 Cal. Rptr. 3d 567, 574 (Cal. Ct. App. 2008).

83. *Id.* “As the Supreme Court has repeatedly said, ‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.” *Id.* (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

III. BECAUSE IMMIGRATION IS INHERENTLY LINKED TO FOREIGN POLICY, THE PREEMPTION RATIONALE APPLIES TO STATE AND LOCAL REGULATIONS THAT SUBSTANTIALLY INTERFERE WITH THE LIFE OF ANY IMMIGRANT PRESENT IN A COMMUNITY BECAUSE OF THE POTENTIAL IMPACT ON AMERICA'S GLOBAL INTERESTS

While comprehensive immigration reform is certainly necessary and proper, an individual state is preempted from enacting these needed reforms because the duty to transform the nation's immigration laws is assigned to both Congress and the President.<sup>84</sup> Professor Michael Olivas has correctly rejected Professor Spiro's argument that the preemption doctrine is weak and outdated by refuting Spiro's flawed conclusion that when the immigration issue is viewed through a foreign policy lens, it "no longer remains an exclusive federal responsibility."<sup>85</sup>

Actually, there is an increasing need for expanding the preemption rationale in those circumstances that impact U.S. immigration policy since immigration is an international issue that impacts globalization.<sup>86</sup> Professor Spiro and his supporters advocate a retreat from uniform federal regulation of immigration in favor of aggressive enforcement of immigration by state and local government, overlooking the clear and unmistakable need for a strong federal preemptive role in a global economy.<sup>87</sup> If the United States is to have an effective role as a global leader in the global economy, it is not appropriate to decrease the preemptive role of the federal government in the field of immigration while assigning an expanding power of state and local officials to regulate the complex field of immigration.<sup>88</sup>

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84. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976). "[T]he responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government." *Id.*

85. Olivas, *supra* note 30, at 29. Professor Olivas reasons that:

The problem with . . . this entire line of reasoning, is that there is no compelling reason to discard the preemption power, as it retains its common law and statutory vitality; the premises behind the state preclusion/state rights equation are not as one-sided as Spiro (or restrictionists, generally) would have us believe; and the momentum of "demi-sovereignties" runs in the opposite direction, that is, it is not the individual [fifty] states that are shedding their traditional place in federalism's constitutional arrangement, rather it is the nation-state repositioning itself in regional, transnational, multilateral compacts and arrangements between and among nations that is evident in the world polity.

*Id.*

86. *Id.* (arguing "the internationalization of the United States and world economies" makes preemption even more vital in this framework).

87. *Id.* at 29-30.

88. *Id.* at 29. "I concluded then, and still believe, that '[p]reemption, for all its detriments and foolish inconsistencies, is the devil we know. A postmodern state cannot coexist

Conversely, Professor Rigel C. Oliveri's lack of faith in preemption as an effective tool to protect immigrants from state and local anti-immigration laws that attempt to regulate immigration without the express permission is not properly justified.<sup>89</sup> Professor Oliveri believes that "preemption is a risky and unsatisfying" line of attack against local anti-immigrant regulations because future courts may not find these, or similar anti-immigration ordinances, preempted under the federal standard.<sup>90</sup> It is my position that Professor Oliveri's rationale for rejecting preemption as an effective tool for attacking anti-immigrant housing regulations and other attempts to regulate immigration should be rejected.<sup>91</sup> This is so because there is never a guarantee that any court interpreting the dynamic federal Constitution will, due to public policy considerations, construe any constitutional provision the same, even if the facts presented are identical. A state's traditional police power in either housing or employment is not an adequate justification for a state to unilaterally determine the conditions under which an immigrant remains in the United States.<sup>92</sup>

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with medieval constructs.'" *Id.* (citing Michael A. Olivas, Comment, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217, 236 (1994)).

89. See Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 68 (2009) (explaining why preemption is "a risky and unsatisfying approach").

90. See *id.* at 68–69 (2009) (discussing the issues with relying on express field preemption, implied field preemption and conflict preemption in attacking AIHOs). In Professor Oliveri's view:

Whether because of political gridlock, the complexity of the issue, or the enormity of the problem, the federal government has not effectively prevented unauthorized people from entering the country or removed those who do. Meanwhile, local communities are faced with the practical task of absorbing influxes of immigrants, legal and otherwise. The community's housing stock, schools, workplaces, and hospitals are directly affected by such demographic changes. As a result, local governments will invariably continue to take action[—] in ways that may be either pro-or anti-immigrant. In light of this reality, it is unsatisfying to dismiss these attempts as being outside the constitutional scope of their powers.

*Id.* at 70.

91. See *id.* at 72 (discussing the idea that scholars should instead focus on the "substantive issues raised by these ordinances").

92. See Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 987–91 (2004) (contending that the immigration power belongs exclusively to the federal government and that it should be implemented uniformly). Pham argues:

The Constitution requires uniform enforcement in immigration laws because the immigration power is an exclusively federal power that must be exercised uniformly. This conclusion is compelled by an examination of the sources of the immigration power, as well as by the power's inextricable foreign policy implications. Moreover,



If a state may deny a person housing based upon its independent determination of immigration status, it essentially determines that an immigrant can remain in a specific local community within the United States only if willing to be homeless, which is both inhumane and violates the constitutional command of *De Canas v. Bica*.<sup>93</sup> The Supreme Court has held that state and local governments cannot independently regulate immigration by determining under what terms and conditions a person remains in the United States, regardless of whether those terms and conditions are reasonable.<sup>94</sup> When county or city anti-immigrant housing ordinances (AIHOs) deny an immigrant the right to lease a home or apartment because of immigration status, the local law creates an unreasonable burden in the terms and conditions under which a person may remain in the United States. Federal immigration status can only be decided by federal authorities and should be preempted because only the federal government can regulate immigration.<sup>95</sup>

To undo the regulatory effects of AIHOs, courts predominantly utilize the legal doctrine of preemption.<sup>96</sup> I take the position that the preempt-

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the constitutional mandate for uniformity requires uniform enforcement, as well as uniform laws, because in the immigration law context, non[-]uniform enforcement has the same negative effect as non[-]uniform laws and implicates the same foreign policy concerns.

*Id.* at 987.

93. *De Canas v. Bica*, 424 U.S. 351, 355 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power."). The Court noted that there are times when, although a state regulation may be "harmonious with federal regulation" the Supremacy Clause nonetheless requires invalidation. *Id.* at 356.

94. *Id.* at 358. "[E]ven absent such a manifestation of congressional intent to 'occupy the field,' the Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any federal laws or treaties." *Id.* at 358 n.5.

95. *See id.* at 351, 358 n.6 (discussing laws which are impermissible if they impose burdens "not contemplated by Congress") The Court adds:

The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers; *they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence* of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of *aliens lawfully within* the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.

*Id.* (quoting *Torao Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948)) (internal citations omitted).

96. *See* Guzmán, *supra* note 32, at 405 (advocating in favor of the preemption doctrine presenting a strong argument to be used to attack AIHOs). The author also notes that "[p]laintiffs have successfully argued federal preemption of AIHOs in four municipalities: Hazleton, Pennsylvania; Farmers Branch, Texas; Escondido, California; and Riverside, New Jersey." *Id.* at 406.

tion rationale applies equally to local AIOHs, which openly target immigrants for regulation and facially neutral local AIHOs that have the effect of policing a person's federal immigration status. When a facially neutral AIHO disproportionately denies a documented or undocumented immigrant the ability to occupy a home because of federal immigration status, the state has unilaterally imposed a condition for remaining in the United States in violation of the preemption rationale because only Congress can regulate immigration. When a facially neutral AIHO's disparate impact has the practical effect of regulating the terms and conditions of a person's federal immigration status, the preemption doctrine applies, and the conclusion that the preemption analysis does not apply should be rejected.<sup>97</sup>

The traditional function of local government in establishing housing regulations does not exempt AIHOs from preemption when those facially neutral ordinances are impermissible tools for policing a person's federal immigration status in violation of the Naturalization Clause.<sup>98</sup> The express power given to Congress in the Naturalization Clause cannot be undermined by an AIHO, which is justified by the rationale that a traditional local governmental role regarding housing ordinances allows it to regulate immigration without the express approval of Congress. Unlike one commentator, I believe immigrant-rights activists should challenge occupancy ordinances that are a traditional part of property maintenance codes because the preemption doctrine also applies to facially neutral local AIHOs that are effective tools for specifically regulating the federal immigration status of undocumented immigrants.<sup>99</sup> Because immigration is always related to the conduct of foreign affairs,<sup>100</sup> local and state AIHOs are inherently preempted when they have a disparate, hostile im-

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97. *Id.* at 431–32 (calling for Congress to pass legislation which would put immigration within the first and second tests under preemption doctrine so as to bolster challenges to AIHOs under that theory).

98. U.S. CONST. art. I, § 8, cl. 4 (Congress shall have exclusive power “[t]o establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States”). “The textual sources that have been identified at various times by the Supreme Court as giving rise to the immigration power[—]the Naturalization Clause, the Foreign Affairs Clauses, and the Commerce Clause[—]were intended to be and have been treated by courts as establishing exclusively federal powers.” Pham *supra* note 92, at 988.

99. See Guzmán, *supra* note 32, at 404, 424 (arguing that “activists challenging occupancy ordinances that are ordinarily a part of property maintenance codes are unable to make use of preemption doctrine in their challenges because occupancy ordinances do not specifically single out any group of people”).

100. See Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1, 2 (2010) (“[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a repub-

pact on persons living in the United States because of their undocumented immigration status.

As discussed above, more than 135 years ago in *Chy Lung v. Freeman*, the Supreme Court properly recognized the federal government's authority over immigration as a natural emanation from the federal responsibility involving foreign policy, and invalidated a California law regulating Chinese immigration.<sup>101</sup> The rationale for the Supreme Court's holding in the case was based on its explicit apprehension about the effect state regulation might have on American foreign policy.<sup>102</sup> More than 120 years ago in the *Chinese Exclusion Case*,<sup>103</sup> the Court held noncitizens' activities, duration of presence in the United States, and immigration status constituted foreign policy concerns that only the federal government had the power to regulate.<sup>104</sup> The *Chinese Exclusion Case* removed from the states their original responsibility as the most important regulators of the passage of immigrants.<sup>105</sup> Today, it is essential that the immigration preemption rationale return to its foreign policy roots in order to stop the increase in state and local regulation of immigration.<sup>106</sup> A single state's use of its local police power to demonstrate hostility toward an immigrant group should not place the United States' national economy at risk of hostile economic retaliation from a foreign country.

In the contemporary global economy, our national economy is closely linked to the international financial marketplace.<sup>107</sup> The United States' \$457 billion dollar bilateral merchandise trade with China as well as the fact that Mexico is the second largest U.S. export market supports the assertion that U.S. foreign commercial activity preempts any individual state or local community from again acquiring the responsibility to regulate immigration.<sup>108</sup> The U.S. economy relies a great deal on the inflow

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lican form of government.") (citing *Demore v. Hyung Joon Kim*, 538 U.S. 510, 521 (2003) (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976))).

101. *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1876).

102. *Id.*; Stumpf, *supra* note 40, at 1571.

103. 130 U.S. 581 (1889).

104. *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 605–06 (1889); Stumpf, *supra* note 40, at 1573.

105. Stumpf, *supra* note 40, at 1573.

106. *Id.* at 1570–73.

107. See MARC LABONTE & WAYNE M. MORRISON, CONG. RESEARCH SERV., RL 31314, CHINA'S HOLDINGS OF U.S. SECURITIES: IMPLICATIONS FOR THE U.S. ECONOMY 1 (2011), available at <http://www.fas.org/sgp/crs/row/RL34314.pdf> (discussing U.S. dependence on foreign savings and U.S. interaction with China and other markets).

108. WAYNE M. MORRISON, CONG. RESEARCH SERV., RL 33536, CHINA-U.S. TRADE ISSUES 1 (2011), available at <http://fpc.state.gov/documents/organization/167991.pdf> (This figure represents the total trade between countries, imports and exports, for the fiscal year 2010. *Id.* China and Canada are the third and first destinations of U.S. export goods respectively).

of funds from other nations, such as China, whose enhanced savings rates facilitate economic growth and finance the federal budget deficit.<sup>109</sup> International investment in U.S. treasury securities is needed to put money into programs that encourage economic revival.<sup>110</sup> A mishandling of the immigration issue by a single state or local government entity involving a citizen from China in 2011 could be detrimental to our national economy. Due to the importance of American international commercial activity it is imperative that states be preempted from regulating either foreign commerce,<sup>111</sup> or from determining the immigration status of foreign citizens<sup>112</sup> if lacking the express approval of Congress. Congress's immigration power has been construed to flow from the Naturalization Clause, the Foreign Affairs Clause, and the Commerce Clause.<sup>113</sup> Immigration issues have a presumed effect on U.S. foreign policy and foreign trade, and the Supreme Court has preempted unilateral state laws regulating immigration even as it approves federal laws that are comparable to state law, because the United States has only one national voice regarding foreign affairs.<sup>114</sup>

The current political debate over whether federal or local law enforcement should be responsible for enforcing immigration policy<sup>115</sup> is easily

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109. LABONTE & MORRISON, *supra* note 107.

110. *Id.*

111. U.S. CONST. art. I, § 8, cl. 3. "The Congress shall have the Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

112. U.S. CONST. art. I, § 8, cl. 4. "The Congress shall have the Power . . . to establish an uniform Rule of Naturalization . . . ." *Id.*

113. Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1381 (2006) (describing effects of the federal government pushing local authorities to enforce immigration laws). There is agreement amongst scholars and courts that the authority to regulate immigration exclusively lies with the federal government. *Id.* The immigration powers are not enumerated in the constitution, however it has been recognized that the federal government has sole control over immigration issues. *Id.*

114. *Id.*

115. See Christopher Carlberg, Note, *Cooperative Noncooperation: A Proposal for an Effective Uniform Noncooperation Immigration Policy for Local Governments*, 77 GEO. WASH. L. REV. 740, 753–55 (2009) (presenting an in-depth discussion of the current political debate). Noncooperation policies are created in an attempt to keep local law enforcement from interfering with federal enforcement of immigration laws. *Id.* at 742. Furthermore, noncooperation laws encourage undocumented immigrants to report crime to local enforcement, without fear of deportation. *Id.* at 748–49. Those in favor of noncooperation laws state that this will help local law enforcement fight crime, because it would increase the amount of crimes reported by undocumented aliens. *Id.* at 753. Undocumented aliens are frequently the victims of "crime, fraud, and exploitation." *Id.* at 741. This is because they are easy to prey on, since criminals know they have a fear of reporting crimes and facing possible deportation. *Id.* Those opposed to noncooperation

resolved in favor of federal preemption when immigration policy is properly regarded as foreign policy. There are approximately twelve million undocumented immigrants now living in this country without documentation<sup>116</sup> most having violated federal immigration laws by either coming to the United States or by staying longer than permitted under a legally acquired visa.<sup>117</sup> One commentator has concluded that local governments cannot wait on comprehensive federal immigration reform before regulating the presence of the many undocumented immigrants who live in their communities now.<sup>118</sup> Furthermore, they argue that an individual state's attempt to regulate the presence of an immigrant in the community in a humane and non-hostile manner is not likely to place the United States' international economic interest at risk. But this is a falsity because even adoption of local immigration rules that are friendly to undocumented immigrants undermines the federal government's ability to speak as one voice on foreign policy.

#### IV. AN ANALYSIS OF THE PREEMPTION ISSUE: WHERE STATE LAWS OR POLICIES RELATING TO IMMIGRANTS ARE IN CONFORMITY WITH THE SUPREMACY CLAUSE

In a recent case concerning students unlawfully attending post-secondary schools in the United States, the California Supreme Court held that California Education Code Section 68130.5 (Section 68130.5)<sup>119</sup> could ex-

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laws argue that this avoids federal immigration laws and will continue to allow undocumented immigrants to enter illegally. *Id.* at 753. However, there have been attempts on the federal level "to discourage local governments from enacting noncooperation laws." *Id.* at 754.

116. Jerry Markon, *Obama Administration Widens Challenges to State Immigration Laws*, WASH. POST, Sept. 29, 2011, [http://www.washingtonpost.com/politics/obama-administration-widens-challenges-to-state-immigration-laws/2011/09/28/gIQA8HgR7K\\_story.html](http://www.washingtonpost.com/politics/obama-administration-widens-challenges-to-state-immigration-laws/2011/09/28/gIQA8HgR7K_story.html). Opponents of illegal immigration have stated a couple reasons as to why there is a high number of illegal immigrants residing in the country. Several advocates who support strict immigration laws have stated that a contribution to the number of illegal immigrants who have remained here has been the decision by the Obama administration to stop "high-profile raids." Julia Preston, *11.2 Million Illegal Immigrants in U.S. in 2010, Report Says; No Change from '09*, N.Y. TIMES, Feb. 1, 2011, <http://www.nytimes.com/2011/02/02/us/02immig.html>. It is possible that the decision to thwart "work-site enforcements" has an effect of attracting illegal immigrants to stay in the country because they feel less threatened. *Id.* Additionally, opponents of illegal immigration have stated that birthright citizenship, protected under the Fourteenth Amendment, encourages illegal immigrants to come into the United States and have children on U.S. territory and obtain American citizenship. *Id.*

117. Carlberg, *supra* note 115, at 740–41.

118. *Id.* at 741.

119. CAL. EDUC. CODE § 68062 (Deering 2000); CAL. EDUC. CODE § 68130.5 (Deering 2011 Supp.).

empt unlawful immigrants from paying nonresident tuition at California state colleges and universities.<sup>120</sup> The court determined that Section 68130.5 did not violate a federal law that denies a state the ability to grant preferential treatment for higher educational benefits to undocumented immigrants on the basis of residence.<sup>121</sup> The California Supreme Court acknowledged that it had received many briefs making policy arguments regarding the validity of tuition exemption for undocumented immigrant college students.<sup>122</sup> Whether Congress's ban against preferential treatment or the California Legislature's exemption is respectable and decent public policy is not for the court to decide.<sup>123</sup>

Although the United States Supreme Court has not openly tackled the issue of undocumented students and higher education, Beverly Rich asserted that the Court addressed a similar problem involving undocu-

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Notwithstanding any other provision of law: (a) A student, other than a nonimmigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of Title 8 of the United States Code, who meets all of the following requirements shall be exempt from paying nonresident tuition at the California State University and the California Community Colleges: (1) High school attendance in California for three or more years. (2) Graduation from a California high school or attainment of the equivalent thereof. (3) Registration as an entering student at, or current enrollment at, an accredited institution of higher education in California not earlier than the fall semester or quarter of the 2001-02 academic year. (4) In the case of a person without lawful immigration status, the filing of an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so. (b) A student exempt from nonresident tuition under this section may be reported by a community college district as a full-time equivalent student for apportionment purposes. (c) The Board of Governors of the California Community Colleges and the Trustees of the California State University shall prescribe rules and regulations for the implementation of this section. (d) Student information obtained in the implementation of this section is confidential.

EDUC. CODE § 68130.5.

120. *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 859 (Cal. 2010), *cert. denied*, 563 U.S. \_\_\_, 131 S. Ct. 2961 (2011).

121. 8 U.S.C. § 1623(a) (2006).

Notwithstanding Any Other Provision Of Law, An Alien Who Is Not Lawfully Present In The United States Shall Not Be Eligible On The Basis Of Residence Within A State (Or A Political Subdivision) For Any Postsecondary Education Benefit Unless A Citizen Or National Of The United States Is Eligible For Such A Benefit.

*Id.*

122. *Martinez*, 241 P.3d at 859. "We have received arguments that [S]ection 68130.5 affords deserving students educational opportunities that would not otherwise be available and, conversely, arguments that it flouts the will of Congress, wastes taxpayers' money, and encourages illegal immigration." *Id.*

123. *Id.* The Court "must decide the legal question of whether California's exemption violates Congress's prohibition or is otherwise invalid. We must decide the statutory question by employing settled methods of statutory construction." *Id.*

mented elementary and secondary students in *Plyler v. Doe*.<sup>124</sup> Rich's discussion of *Plyler* supports the argument that *Plyler* could apply to cases involving either secondary or post-secondary education because by denying undocumented students a free public secondary education, or by demanding an increased tuition for post-secondary education, the governmental policy creates a lifetime social-economic status disadvantage requiring substantial justification.<sup>125</sup> Under the rationale of *Plyler v. Doe*, it is a violation of the Equal Protection Clause for either the federal government or a state to impose upon, without substantial justification, a discrete class of students who are not responsible for their undocumented immigration status.<sup>126</sup> Justice Blackmun's concurring opinion in *Plyler* articulated the rationale that the government must demonstrate, at a minimum, a substantial governmental interest when it creates a class distinction that makes education available to children within the community while denying education to undocumented children that otherwise would be provided schooling.<sup>127</sup> Class distinctions are fundamentally inconsistent with the Equal Protection Clause when they serve as the basis for deciding which immigrant living in a state receives or is denied an education, unless the government demonstrates at a minimum a substantial governmental interest.<sup>128</sup> Classifications involving an unreasonable denial of an equal post-secondary educational opportunity to potential college students living in a state since early childhood "strike at the heart of equal protection values by involving the State in the creation of permanent class distinctions."<sup>129</sup> Justice Blackmun reasoned that class, based on distinctions contained in federal laws, violate the Equal Protection

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124. 457 U.S. 202 (1982).

125. Beverly N. Rich, *Tracking AB 540's Potential Resilience: An Analysis of In-State Tuition for Undocumented Students in Light of Martinez v. Regents of the University of California*, 19 S. CAL. REV. L. & SOC. JUST. 297, 298-99 (2010); see *Plyler v. Doe*, 457 U.S. 202, 223-24 (1982) ("By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.").

126. *Plyler*, 457 U.S. at 230. "It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation." *Id.* For an argument that the proposition of *Plyler* should be applied beyond post-secondary education to professional licensing exams see J. Austin Smithson, Comment, *Educate Then Exile: Creating a Double Standard in Education for Plyler Students Who Want to Sit for the Bar Exam*, 11 SCHOLAR 87, 104 (2008).

127. *Plyler*, 457 U.S. at 234 (Blackmun, J., concurring). "Children denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve." *Id.*

128. *Id.* at 235 n.3 (Blackmun, J., concurring).

129. *Id.* at 234.

Clause, except when those distinctions are supported by substantial justification.<sup>130</sup>

A. *When Preemption Does Not Apply*

In *Martinez v. Regents of the University of California*, the court was charged with determining whether a California law granting in-state tuition to undocumented immigrants without extending the same benefits to nonresidents violated 8 U.S.C. Section 1623(a).<sup>131</sup> Section 1623 limits preferential treatment for undocumented immigrants in receipt of higher education benefits based on state residency.<sup>132</sup> The Section states:

(a) In general. Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.<sup>133</sup>

*Martinez* centered on California Education Code Section 68130.5 that grants an exemption from paying out-of-state tuition to students who attended high school in California for a minimum of three years and who met other, additional requirements.<sup>134</sup> Because not everyone who attended a California high school for three years would qualify as a California resident for purposes of in-state tuition and some unlawful aliens who would have qualified as a resident, but for their unlawful status, are entitled to the exemption, the California Supreme Court decided the tuition fee exemption was not based on California residency.<sup>135</sup> According to the logic of the California Supreme Court, since the exemption is based

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130. *Id.* at 233-34.

[W]hen a State provides an education to some and denies it to others, it immediately and inevitably creates class distinctions of a type fundamentally inconsistent with [the equal protection of the laws]. Children denied an education are placed at a permanent disadvantage, for an uneducated child is denied even the opportunity to achieve. And when those children are members of an identifiable group, that group – through the State's action – will have been converted into a discrete underclass.

*Id.* at 234.

131. *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 859 (Cal. 2010), *cert. denied*, 563 U.S. \_\_\_, 131 S. Ct. 2961 (2011).

132. 8 U.S.C. § 1623 (2006).

133. *Id.*

134. CAL. EDUC. CODE § 68130.5 (Deering 2011 Supp.).

135. *Martinez*, 241 P.3d at 860.



on criteria other than residency, the provision in Section 68130.5 is not preempted by 8 U.S.C. Section 1623(a).<sup>136</sup>

Ralph W. Kasarda, a Staff Attorney at the Pacific Legal Foundation, takes the position that state laws granting in-state tuition to illegal aliens are expressly preempted by 8 U.S.C. Section 623(a)'s limitation on preferential educational benefits for undocumented immigrants and 8 U.S.C. Section 1601's restriction on welfare benefits for immigrants.<sup>137</sup> Because as many as 6,000 unlawful aliens would benefit from Section 68130.5, whereas just 500 legal, nonresident students would benefit, some have concluded that Section 68130.5 is a de facto education benefit based on residency and preempted by the federal statute.<sup>138</sup> Kasarda contends that Section 68130.5 conflicts with federal preemption policy in the field of immigration by "providing a perverse form of affirmative action to illegal aliens in the form of in-state tuition" if the undocumented immigrant can pass the implied defacto residency test.<sup>139</sup>

In *Martinez*, the plaintiffs claimed to be U.S. citizens, who were either current or former students paying nonresident tuition at a California public university or college, and that they were unlawfully deprived of an

136. See *id.* at 864 (noting that because nonresidents may qualify for the exemption rules from the possibility that the exemption is based on residence alone, and pointing out that the "other requirements are not the functional equivalent of residing in California").

137. See Ralph W. Kasarda, *Affirmative Action Gone Haywire: Why State Laws Granting College Tuition Preferences to Illegal Aliens Are Preempted by Federal Law*, 2009 B.Y.U. EDUC. & L.J. 197, 212, 222 (2009) (noting that the preemption doctrine requires an examination of congressional intent).

According to the House Conference Report on 8 U.S.C. § 1621, the intent and effect of that section is to make illegal aliens "ineligible for all State and local public benefits, with limited exceptions for emergency medical services, emergency disaster relief, immunizations and testing and treatment for symptoms of communicable diseases, and programs necessary for the protections of life or safety."

*Id.* at 222. 8 U.S.C. Section 1601 is a statement discussing the national policy on welfare and immigration. 8 U.S.C. § 1601 (2006). Subsection 7 states that:

With respect to the State authority to make determinations concerning the eligibility of qualified aliens for public benefits in this title, a State that chooses to follow the Federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy.

*Id.*

138. Kasarda, *supra* note 137, at 220-21 (elaborating on the fact that the section "bestows upon illegal aliens a postsecondary education benefit[—]eligibility for in-state tuition based on residence," a benefit not given to U.S. citizens without considering residence).

139. *Id.* at 222. If a student can show that she attended a California high-school for three years, she is eligible for in-state tuition at California colleges. *Id.* This residency test for in-state tuition applies to students regardless of whether they are U.S. citizens, nationals or illegal aliens. *Id.*

exemption from nonresident tuition under Section 68130.5.<sup>140</sup> The complaint of the plaintiffs included ten causes of action, including field preemption as the sixth cause of action.<sup>141</sup> Plaintiffs alleged that if Section 68130.5 was invalid on any of their causes of action, including preemption, they should be entitled to reimbursement of nonresident tuition fees in addition to damages and attorney fees.<sup>142</sup>

In agreement with the court's decision finding against preemption the Asian Pacific American Legal Center and eighty other Asian Pacific American organizations filed an amicus brief in support of the defendants.<sup>143</sup> The brief agreed with the line of reasoning, which claims that because higher education is a typical area of state control, a court applying the strong presumption against preemption of a state's valid education concern should conclude federal law does not preempt Section 68130.5.<sup>144</sup> California, like many other states, has an established history of controlling its college tuition rates and fees free of "interference from the federal government."<sup>145</sup>

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140. *Martinez*, 241 P.3d at 860.

141. *Id.*

142. *Id.*

143. Application for Leave to File Amicus Curiae Brief and Brief of Amici Curiae Asian Pacific American Legal Center and 80 Asian Pacific American Organizations in Support of Respondents and Defendants the Regents the Univ. of Calif. et al., *Martinez*, 241 P.3d 855 (2009) (No. S167791), 2009 WL 3563895.

144. Paul S. Chan et al., *Application for Leave to File Amicus Curiae Brief and Brief of Amici Curiae Asian Pacific American Legal Center and 80 Asian Pacific American Organizations in Support of Respondents and Defendants the Regents the Univ. of Calif. et al.*, 15 ASIAN PAC. AM. L.J. 52, 68 (Fall/Spring 2009–10) (citing *Md. Stadium Auth. v. Ellerbe Becket Inc.*, 407 F.3d 255, 265 (4th Cir. 2005)). "Because California and other states traditionally have regulated the levels of tuition and fees charges to students at their public colleges and universities, federal laws that intrude upon these state educational concerns must be narrowly construed, and the Court must apply a strong presumption against preemption of state law." *Id.*; see *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 428–29, 432, 436 (2002) (refusing to extend the federal government's right, under the Family Educational Rights and Privacy Act of 1974 (FERPA), to regulation education records to the practice of peer grading). The Supreme Court reversed the judgment of the Court of Appeals for the Tenth Circuit, stating:

The Court of Appeals' logic does not withstand scrutiny. Its interpretation, furthermore, would effect a drastic alteration of the existing allocation of responsibilities between [s]tates and the National Government in the operation of the Nation's schools. We would hesitate before interpreting the statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation. This principle guides our decision.

*Id.* at 432; see *Bronco Wine Co. v. Jolly*, 95 P.3d 422, 429 (Cal. 2004) (noting the assumption that traditional state powers are not superseded by federal law in cases where federal preemption of state law is claimed).

145. Chan et al., *supra* note 144.

The field theory of preemption does not apply to Section 68130.5.<sup>146</sup> Congress has not demonstrated intent to regulate the area involving in-state higher education tuition fees.<sup>147</sup> A federal court has appropriately concluded that federal law, as a general matter, does not regulate the college admissions process, and that Congress has failed to enact legislation regarding the eligibility of undocumented immigrants for admission in public post-secondary education.<sup>148</sup> It disregards logic to presume that by passing federal conditions for non-immigrant foreign nationals to enter the United States to engage in a line of study, Congress left states without authority to refuse admission to undocumented immigrants—a group that unquestionably contains a number of people who evaded the student visa procedure by entering and living in this country illegally.<sup>149</sup> At a bare minimum, Congress has not completely occupied the field of alien's access to post-secondary education through immigration legislation<sup>150</sup> prohibiting post-secondary education benefits to unlawful aliens on the basis of residence within a state.<sup>151</sup>

In deciding *Martinez v. Regents of the University of California*, the California Supreme Court said that although federal immigration authority is exclusive, it is incorrect to conclude that any and all state regulations touching on aliens are preempted.<sup>152</sup> The exclusive rationale of the preemption doctrine routinely applies when the state statute regulates immigration by deciding who is permitted to enter the country and the circumstances or environment under which a legal entrant has the ability to stay.<sup>153</sup> After suggesting the usual rules of preemption analysis apply only to lawful entrants the California Supreme Court proceeded to apply the usual rules of preemption to the Section 68130.5 grant of education benefits to students unlawfully present in America<sup>154</sup> Under the rules of preemption, a state law is displaced if affirmative congressional action

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146. See *id.* at 68-69 (noting that because regulation of education has traditionally been up to the state of California Section 68130.5 does not apply).

147. Debra Urteaga, *California Dreaming: A Case to Give States Discretion in Providing In-State Tuition to Its Undocumented Students*, 38 HASTINGS CONST. L.Q. 721, 737 (2011) (citing *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 605 (E.D. Va. 2004)).

148. *Merten*, 305 F. Supp. 2d at 605.

149. *Id.* at 606.

150. See 8 U.S.C. § 1623(a) (2006) (asserting that an undocumented alien isn't eligible for secondary education based on residence unless a citizen is eligible when residence is not an issue).

151. *Merten*, 305 F. Supp. 2d 585 at 606.

152. *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 861 (Cal. 2010), *cert. denied*, 563 U.S. \_\_\_, 131 S. Ct. 2961 (2011).

153. *Id.* at 861-62.

154. *Id.* at 862.

requires removal of the state law.<sup>155</sup> In view of the fact that Section 68130.5 fails to regulate who can enter; or stay in the United States, the California Supreme Court moved forward with its analysis under the standard preemption rules.<sup>156</sup>

Because a number of states have laws similar to Section 68130.5, the Supreme Court of California's decision to utilize standard preemption rules in deciding the applicability of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)<sup>157</sup> is an important precedent.<sup>158</sup> The California Supreme Court's preemption analysis is important because the states of California, Illinois, Kansas, Nebraska, New York, Oklahoma, New Mexico, Texas, Utah, Washington, and Wisconsin have all enacted the Development, Relief and Education for Alien Minors (hereinafter DREAM Acts), which are similar to Section 68130.5 and grant in-state tuition rates to unlawful immigrants without extending the same benefit to non-residents.<sup>159</sup> Professor Oas contends Section 68130.5 and the other ten states with local DREAM Acts allow states to decide their own residency guidelines for the objective of establishing who is permitted to receive in-state tuition for higher education, which is in total disregard of IIRIRA's requirement to grant in-state tuition benefits to nonresident students whenever it is granted to students not lawfully present in the United States.<sup>160</sup>

#### B. *Impact of Federal Legislation*

The failure to enact the federal DREAM Act of 2010 represents a continuing chain of unsuccessful federal legislative attempts to provide an avenue towards citizenship for undocumented immigrants transported to the United States as children, either by way of acquiring a degree from a college or in the course of military service.<sup>161</sup> State legislation on the

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155. *Id.*

156. *Id.*

157. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.).

158. Professor Denise Oas describes this as a "total disregard for the provisions of the Illegal Immigrant Reform and Immigration Responsibility Act (IIRIRA)." Denise Oas, *Immigration and Higher Education: The Debate Over In-State Tuition*, 79 UMKC L. REV. 877, 880 (2011).

159. *Id.*

160. *Id.*; 110 Stat. at 3009-672 (codified in 8 U.S.C. § 1623).

161. DREAM Act of 2010, S. 3992, 111th Cong. §§ 4, 6 (2010); Elisha Barron, *Recent Development: The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 623 (2011). If passed, the DREAM Act would have permitted the cancellation of deportation proceedings against children who entered the United States before age sixteen, remained for at least five years, demonstrated good moral character,

subject of post-secondary education benefits for unlawful immigrants originated more than ten years ago in Texas.<sup>162</sup> In 2001, Texas adopted H.B. 1403 (Texas Dream Act) as a reaction to federal limitations on an undocumented student's right to use in-state tuition; the Bill provides specified immigrant students with "residency" in order to qualify for in-state tuition.<sup>163</sup> The Supreme Court has declined to review objections to the Texas law and other state statutes giving students unlawfully present in the United States residency in order to let them qualify for in-state tuition rates.<sup>164</sup> "After the 2010 DREAM Act failed to get through the Senate, several state legislators introduced legislation at the state level that would make undocumented students who attended state high schools and whose parents paid taxes in the state eligible for in-state tuition."<sup>165</sup> One perceptive and discerning commentator correctly concludes that to establish qualifications for in-state tuition by considering local high school attendance, as an alternative to residency, these state laws escape the 1996 law that clearly prohibits states from offering in-state tuition based on residency to immigrants unlawfully present in the United States unless they offer the same benefits to all students, no matter which state citizenship they might possess.<sup>166</sup> In *Martinez v. Regents of the University of California*, the California Supreme Court upheld Section 68130.5, California's version of the Dream Act, because the law was not based on residency, and it did not violate a single federal law.<sup>167</sup> Furthermore, the

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and had not been convicted of either a felony or three or more misdemeanors. DREAM Act of 2010 § 4. Additionally, the children must have been admitted to an institute of higher education or have earned their high school diploma when the act was passed. *Id.* The applicant must have completed at least two years and maintained good standing at an institute of higher education to qualify for admittance as a permanent resident. DREAM Act of 2010 § 6. Furthermore, in order to qualify for residency based on military service, an applicant must have dedicated at least two years of time. *Id.* If an applicant is discharged from military service by the date of his or her application, the discharge must have been honorable. *Id.*

162. Barron, *supra* note 161, at 652.

163. H.B. 1403, 77th Leg. Sess. (2001) (codified at TEX. EDUC. CODE § 54.051(m)). A Texas resident is defined as an individual who has lived in the state for one year prior to the academic year, an individual who has graduated from public or private school in Texas, or an individual who has lived in the state for three consecutive years before graduating from high school. TEX. EDUC. CODE § 54.052 (2007).

164. Barron, *supra* note 161, at 652. For example, the Court rejected an attempt to overturn "a provision of Kansas law that permits certain illegal aliens to qualify for in-state tuition rates." *Day v. Bond*, 500 F.3d 1127, 1130 (10th Cir. 2007), *cert. denied*, 554 U.S. 918 (2008).

165. Barron, *supra* note 161, at 652.

166. *Id.* at 652–53 (2011).

167. *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855 (Cal. 2010), *cert. denied*, 563 U.S. \_\_\_, 131 S. Ct. 2961 (2011); Barron, *supra* note 161, at 653. Speculation is that if

court also found that Section 68130.5 was not impliedly preempted by federal law.<sup>168</sup>

The issue before the United States Supreme Court in *Chamber of Commerce of the United States v. Whiting* was whether IRCA preempted Arizona's unlawful immigrant employment law.<sup>169</sup> The Arizona law in question allows the state to revoke or suspend business licenses of employers that knowingly or intentionally employ unauthorized workers, and makes it mandatory for every employer to confirm hired employees are qualified to participate by means of a specific Internet-based system known as E-Verify.<sup>170</sup> In *Whiting*, the Court concluded that the Arizona law permitting suspension and revocation of business licenses is covered by the IRCA Savings Clause, and the suspension, along with the revocation of business licenses, was not impliedly preempted because the law fails to conflict with federal law.<sup>171</sup> Furthermore, the Arizona law commands that each employer confirm the employment approval of hired employees via a particular internet-based system simply does not conflict with relevant federal law.<sup>172</sup> The Court's analysis in *Whiting* revealed that a state regulating immigration through its own employment verification is permissible as long as the state verification law lacks originality.<sup>173</sup> Although the E-Verify program is voluntary under federal law, it could be made mandatory by a state since federal immigration law only prohibits the Secretary of Homeland Security from requiring mandatory partici-

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challenged the Texas law would also be upheld. Rodney Ellis, *U.S. Should Follow Texas and Pass the DREAM Act*, HOUS. CHRON., Dec. 10, 2010, at B9.

168. Barron, *supra* note 161, at 653.

169. *Chamber of Commerce of the United States v. Whiting*, 563 U.S. \_\_\_, 131 S. Ct. 1968 (2011).

170. ARIZ. REV. STAT. ANN. § 23-214(A) (LexisNexis 2011). "E-Verify is an Internet-based system that compares information from an employee's Form I-9, Employment Eligibility Verification, to data from U.S. Department of Homeland Security and Social Security Administration records to confirm employment eligibility." *What Is E-Verify?*, U.S. CITIZENSHIP & IMMIGR. SERVS., (Sept. 15, 2011), <http://www.uscis.gov> (follow "E-Verify home page" link, then click "What is E-Verify?" in the upper left-hand corner).

171. *Whiting*, 563 U.S. at \_\_\_, 131 S. Ct. at 1976-77, 1985. The savings clause reads as follows: The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens. 8 U.S.C. § 1324a(h)(2) (2006).

172. *Whiting*, 563 U.S. at \_\_\_, 131 S. Ct. at 1985.

173. Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1706 (2011). The author of this article emphasizes that the lack of originality in the Arizona law played a key role in the *Whiting* decision. *Id.* The fact that the Arizona law strongly relied on federal determinations allowed it not to be preempted by federal law. *Id.* "[I]f Arizona had been bolder with its verification requirements (for example, by mandating biometric scans of new employees) courts would have quickly struck down the law." *Id.*

pation in E-Verify to those outside of the federal government.<sup>174</sup> Because Arizona is not the Secretary of Homeland Security, this prohibition does not apply to Arizona.<sup>175</sup> The Court made this clear with its assertion that Arizona's use of E-Verify was completely consistent with the federal system: "[T]he consequences of not using E-Verify under the Arizona law are the same as the consequences of not using the system under federal law. In both instances, the only result is that the employer forfeits the otherwise available rebuttable presumption that it complied with the law."<sup>176</sup> Even if the consequences of not using the E-verify system are the same for the employer under Arizona law and federal law, the Arizona law should be preempted because Congress's objective of unifying and connecting immigration verification determinations is not easy to balance with the assortment of state and local laws that will develop as result of the Supreme Court's decision in *Whiting*.<sup>177</sup>

In a dissenting opinion joined by Justice Ginsburg, Justice Breyer wrote that IRCA preempts "any [s]tate or local law [that is] imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit, or refer for a fee for employment, unauthorized aliens."<sup>178</sup> He continues his analysis by stating that because the "Legal Arizona Workers Act inflicts civil action against those who employ unauthorized aliens," the law is within the federal Act's general preemption rule and is preempted because it is not within the federal statutory exception for covering licensing and similar laws.<sup>179</sup> Unlike the Court, Justice Breyer does not believe the Arizona law falls within the scope of the Savings Clause of the federal law and therefore, the law should be preempted.<sup>180</sup> The conflicting views among the justices of the Supreme Court in *Whiting* strongly supports one commentators insightful observation that immigration court opinions require a consistent analytical framework in order to appropriately deal with the contemporary experiments confronting policymakers.<sup>181</sup> "There is nothing per se problematic about the current framework; rather, the problem stems from confusion caused by the courts' unpredictability regarding when

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174. *Whiting*, 563 U.S. at \_\_\_, 131 S. Ct. at 1985.

175. *Id.*

176. *Id.* at 1985–86 .

177. Cunningham-Parmeter, *supra* note 173, at 170.

178. *Whiting*, 563 U.S. at \_\_\_, 131 S. Ct. at 1987 (Breyer, J., dissenting) (citing 8 U.S.C. § 1324a(h)(2) (2006)).

179. *Id.*

180. *Id.*

181. Ryan Terrance Chin, *Moving Toward Subfederal Involvement in Federal Immigration Law*, 58 UCLA L. REV. 1859, 1863 (2011).

deference will be given to the federal government. The courts need a body of law with more clarity and consistency on preemption.”<sup>182</sup>

V. THE *UNITED STATES v. ARIZONA* OPINION AS AN EXAMPLE OF A  
STATE LAW VIOLATING THE LAW OF PREEMPTION BY  
REGULATING IMMIGRATION INDEPENDENT OF  
FEDERAL APPROVAL

The issue at the center of the *United States v. Arizona* case is whether Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act (S.B. 1070) violates the Supremacy Clause because it is preempted by the Immigration and Nationality Act (INA).<sup>183</sup> S.B. 1070 requires that police officers check a person’s immigration status and enforce civil and criminal liability independent of federal approval.<sup>184</sup> While considering the validity of S.B. 1070, a federal appeals court utilized the obstacle of preemption theory to help decide whether Congress intended to preempt any or all of the provisions contained in S.B. 1070.<sup>185</sup> Obstacle preemption occurs when the challenged state law provides “‘an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”<sup>186</sup>

The United States brought action against Arizona to challenge the constitutionality of S.B. 1070.<sup>187</sup> The Court of Appeals for the Ninth Circuit analyzed the congressional intent of the federal government as it related to the contested provisions of S.B. 1070 in order to determine whether the statute was preempted by the federal government under relevant federal law.<sup>188</sup> Under obstacle preemption, the general issue is whether any provisions of S.B. 1070 are an impediment to the implementation of the intent of Congress.<sup>189</sup>

Section 2(B) of S.B. 1070 states that any person shall have his immigration status determined prior to release, and the immigration status shall be verified by the federal government.<sup>190</sup> Under 8 U.S.C. Section 1357,

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182. *Id.*

183. *United States v. Arizona*, 641 F.3d 339, 343–44 (9th Cir. 2011), *cert. granted*, 565 U.S. \_\_ (2011).

184. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *amended by* H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

185. *Arizona*, 641 F.3d at 345.

186. *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

187. *Id.* at 344.

188. *Id.* at 344–45. The court is to first consider Congress’s purpose. *Id.* at 345. Then, the court, must assume that the police powers if the States were not superseded unless it is was clearly what Congress intended. *Id.*

189. *Id.* at 345.

190. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010); *Arizona*, 641 F.3d at 346.



Congress speaks on the issue of under what conditions state officials may assist the federal government in enforcing immigration laws.<sup>191</sup> The court determined that this provision of the U.S. Code illustrates that states are to be “involved in the enforcement of immigration laws” only under close supervision by the Attorney General.<sup>192</sup> S.B. 1070 Section 2(B) places independent state law obligations on state and local officers relating to federal immigration status without supervision by the Attorney General, which conflicts with Congress’s intent of allowing officials to regulate immigration only when they are closely supervised by the Attorney General.<sup>193</sup>

S.B. 1070 Section 2(B) is an obstacle to the constitutional goal of allowing Congress and the President of the United States to speak with one voice on immigration because immigration is inherently linked to foreign affairs.<sup>194</sup> Reports indicate S.B. 1070 has been viewed negatively in the international community.<sup>195</sup> Foreign leaders from many nations, including Mexico, Brazil, and human rights experts from the United Nations, have publically criticized S.B. 1070.<sup>196</sup> Those opposed to the law have

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191. 8 U.S.C. § 1357(g)(3) (2006); *Arizona*, 641 F.3d at 348.

192. *Arizona*, 641 F.3d at 348. The court further states that:

Not only must the Attorney General approve of each individual state officer, he or she must delineate which functions each individual officer is permitted to perform, as evidenced by the disjunctive “or” in subsection (g)(1)’s list of “investigation, apprehension, or detention,” and by subsection (g)(5). An officer might be permitted to help with investigation, apprehension and detention; or, an officer might be permitted to help only with one or two of these functions. Subsection (g)(5) also evidences Congress’s intent for the Attorney General to have the discretion to make a state officer’s help with a certain function permissive or mandatory. In subsection (g)(3), Congress explicitly required that in enforcing federal immigration law, state and local officers “shall” be directed by the Attorney General. This mandate forecloses any argument that state or local officers can enforce federal immigration law as directed by a mandatory state law.

*Id.* at 348–49.

193. *Id.* at 350. The imposition of mandatory duties on local and state officers creates an interference with the authority that the federal government has to implement its law enforcement strategies. *Id.* at 351–52.

194. *Id.* at 352. Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act is an attempt to hijack Congress’s discretionary role delegated to the executive branch. *Id.*

195. *Id.* See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 377 (2000) (stating that when a state law minimizes the federal statute’s commands, such state law is an obstacle to the execution of the intent of Congress).

196. *Arizona*, 641 F.3d. at 353. As a result of S.B. 1070, five of the six Mexican Governors declined invitations to attend the U.S.–Mexico Border Governors’ Conference held in Phoenix, Arizona, September 8–10, 2010. *Id.* Moreover, “the Mexican Senate has postponed review of a U.S.–Mexico agreement on emergency management cooperation to deal with natural disasters.” *Id.*

called it an “an open invitation for harassment and discrimination against Hispanics regardless of their citizenship status.”<sup>197</sup> Other critics argue that the law cultivates racial profiling.<sup>198</sup> The Justice Department believes the fair treatment of foreign nationals present in America will serve to improve our foreign relations with other countries.<sup>199</sup> In the interest of managing foreign relations with one national voice, the Constitution’s grant of the power to Congress to establish uniform rules of naturalization<sup>200</sup> and regulate commerce with the foreign nations<sup>201</sup> preempts S.B. 1070’s local attempt to regulate immigration.

If Arizona is allowed to enact a law placing obligations on state and local officers free of supervision by the appropriate federal official relating to federal immigration status, there is the real “threat of [fifty] states layering their own immigration enforcement rules on top of the INA . . . .”<sup>202</sup> This threat would undermine Congress’s power to regulate immigration by individual power grabs by the states wishing to occupy that field at the local level.<sup>203</sup> In the field of immigration, S.B. 1070 Sec-

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197. Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 23, 2010 <http://www.nytimes.com/2010/04/24/us/politics/24immig.html>. “[P]roponents and critics alike said [the law] was the broadest and strictest immigration measure in generations . . . .” *Id.* “Mexico’s Foreign Ministry said in a statement that it was worried about the rights of its citizens and relations with Arizona.” *Id.*

198. *What Does Arizona’s Immigration Law Do?*, CNN (Apr. 23, 2010), [http://articles.cnn.com/2010-04-23/politics/immigration.faq\\_1\\_arizona-immigration-law-reform-SB1070?s=PM:POLITICS](http://articles.cnn.com/2010-04-23/politics/immigration.faq_1_arizona-immigration-law-reform-SB1070?s=PM:POLITICS). The American Civil Liberties Union of Arizona argues that “most police officers don’t have enough training to look past race while investigating a person’s legal status.” *Id.*

199. See Heather Mac Donald, *Preemption and Prosecutorial Discretion: A Response to Andy McCarthy*, NAT’L REV. (Aug. 2, 2010), <http://www.nationalreview.com/corner/242219/preemption-and-prosecutorial-discretion-response-andy-mccarthy-heather-macdonald> (listing immigration objectives the Department of Justice believes will be harmed by S.B. 1070). The author argues that the list of items, such as facilitating trade and commerce, will not be harmed by S.B. 1070. *Id.*

200. U.S. CONST. art. 1, § 8, cl. 4. “The Congress shall have power to . . . establish an uniform Rule of Naturalization.” *Id.*

201. U.S. CONST. art. 1, § 8, cl. 3. “The Congress shall have power to . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” *Id.*

202. *United States v. Arizona*, 641 F.3d 339, 354 (9th Cir. 2011) (explaining how state statutes may decrease the control federal immigration agencies have over enforcement of the federal immigration statute).

203. See *Buckman Co. v. Plaintiff’s Legal Comm.*, 531 U.S. 341, 350 (2001) (involving conflict between federal FDA regulations and state tort actions). The Court held that “fraud-on-the-agency” state tort claims “would exert an extraneous pull on the scheme established by Congress, and it is therefore pre-empted by that scheme.” *Id.* at 353. “Through Section 2(B), Arizona has attempted to hijack a discretionary role that Congress delegated to the Executive.” *Arizona*, 641 F.3d at 352. See also *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 388 (2000) (holding that a state act is preempted, and there-

tion 2(B) is preempted because immigration is in theory and fact a foreign affair under the Constitution.

Under S.B. 1070 Section 3, Arizona imposes a fine of “as least five hundred dollars” and jail time for individuals guilty of willful failure to complete or carry an alien registration in violation of the United States Code.<sup>204</sup> Title 8 U.S.C. Sections 1304 and 1306 of the INA establish comprehensive penalties regarding the failure to comply federal immigration registration, including a one hundred dollar fine.<sup>205</sup> Section 3 of S.B. 1070 is clearly preempted by 8 U.S.C. §§ 1304 and 1306 because “where the federal government . . . has enacted a complete scheme of regulation, states cannot . . . enforce additional or auxiliary regulations.”<sup>206</sup> Since the federal government has enacted a complete scheme of penalties regarding immigration registration without any mention of state participation, the preemption doctrine prevents Arizona from enforcing any additional or auxiliary penalties, such as the fine and jail time independent of federal immigration registration penalties.<sup>207</sup> For these reasons, Section 3 of S.B. 1070 is also preempted by federal government.

S.B. 1070 Section 5(C) criminalizes unauthorized aliens from knowingly applying for work or soliciting work in Arizona.<sup>208</sup> The provision

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fore unconstitutional under the Supremacy Clause, when “provisions conflict with Congress’s specific delegation to the President of flexible discretion”).

204. S.B. 1070 § 3, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *amended by* H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010); *see Arizona*, 641 F.3d at 354–55 (“Section 3 essentially makes it a state crime for unauthorized immigrants to violate federal registration laws.”).

205. Immigration and Nationality Act, 8 U.S.C. §§ 1304(e), 1306(a) (2006).

Every alien, eighteen years of age and over, shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him pursuant to subsection (d) of this section. Any alien who fails to comply with the provisions of this subsection shall be guilty of a misdemeanor and shall upon conviction for each offense be fined not to exceed [one hundred dollars] or be imprisoned not more than thirty days, or both.

*Id.* § 1304(e).

Any alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application or to be fingerprinted, and any parent or legal guardian required to apply for the registration of any alien who willfully fails or refuses to file application for the registration of such alien shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed [one thousand dollars] or be imprisoned not more than six months, or both.

*Id.* § 1306(a).

206. *Arizona*, 641 F.3d at 355 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 62–63 (1941)).

207. *See id.* at 356 (noting that Section 3’s state punishment for a violation of a federal statute fits within the Supreme Court’s description of proscribed state action within the arena of immigration).

208. S.B. 1070 § 5(C), 49th Leg., 2d Reg. Sess. (Ariz. 2010), *amended by* H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

imposes jail time on those in violation. Under the Immigration Reform and Control Act of 1986 (IRCA), Congress decided not to criminalize unauthorized work.<sup>209</sup> During the Obama administration, rather than criminalizing and detaining unauthorized workers, Immigration and Customs Enforcement conducted audits of employee files to fine businesses hiring unauthorized immigrants and in effect, causing businesses to terminate such employees from work.<sup>210</sup> The imposition of jail time proscribed by S.B. 1070 Section 5(C) for unauthorized work clearly conflicts with the IRCA, in which Congress chose not to criminalize unauthorized work; therefore, Congress also preempts this provision.<sup>211</sup>

Judge Noonan appropriately wrote separately to emphasize the intent of S.B. 1070 and its incompatibility with federal foreign policy.<sup>212</sup> According to Judge Noonan, immigration policy is by necessary implication a subset of foreign policy.<sup>213</sup> It impacts the nation's interactions with foreign peoples and foreign nations.<sup>214</sup> In the global economy, immigration policy impacts the buying and selling conducted by foreigners in America.<sup>215</sup> As the statements of many countries and governmental entities revealed in this case, what happens to foreigners in Arizona has a connection to how Americans will be respected and treated in a foreign

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209. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 U.S.C.). In *National Center*, the Court examined the IRCA and the legislative history behind Congress's decision not to turn unauthorized work into a criminal situation when it determined the intent of Congress was not to impose criminal sanctions against the employee, but to deter illegal immigration by decreasing the number of jobs available to them. *Nat'l Ctr. for Immigrants' Rights, Inc. v. I.N.S.*, 913 F.2d 1350, 1367–68 (9th Cir. 1990).

210. *Immigration and Emigration, Times Topics*, N.Y. TIMES, <http://topics.nytimes.com/top/reference/timestopics/subjects/i/immigration-and-emigration/index.html?scp=1&sq=unauthorized%20workers&st=cse> (last updated Sept. 29, 2011). The Immigration and Customs Enforcement agency conducted audits at over 2,900 companies in 2009, and by mid-2010 had collected \$3 million in civil fines on those businesses that had hired illegal immigrants. *Id.* Furthermore, “[t]he audits force businesses to fire every suspected illegal immigrant on the payroll – not just those who happened to be on duty at the time of a raid . . . .” *Id.*

211. S.B. 1070 § 5(C); *United States v. Arizona*, 641 F.3d 339, 358 (9th Cir. 2011), *cert. granted*, 565 U.S. \_\_ (2011).

212. *See Arizona*, 641 F.3d at 366–69 (Noonan, J., concurring) (discussing the constitutionality of S.B. 1070 with a consideration of federal law and Congressional intent). Judge Noonan stated: “Whatever in any substantial degree attempts to express a policy by a single state or by several states toward other nations enters an exclusively federal field.” *Id.* at 368.

213. *Id.* at 367 (Noonan, J., concurring).

214. *Id.* “[W]hat is done to foreigners here has a bearing on how Americans will be regarded and treated abroad.” *Id.*

215. *Id.*

country.<sup>216</sup> “The foreign policy of the United States preempts the field entered by Arizona. Foreign policy is not and cannot be determined by the several states. Foreign policy is determined by the nation as the nation interacts with other nations.”<sup>217</sup>

## VI. CONCLUSION

The lack of congressional intent on the issue of regulating immigration does not by default create a state right to regulate immigration because immigration is by its very nature foreign policy. The unfortunate implication of the Supreme Court’s holding in *Whiting* is the unintended invitation to some states to negatively impact foreign policy by discriminating against employees because of their national origin.

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216. *Id.*

217. *Arizona*, 641 F.3d at 368 (Noonan, J., concurring).